

**COMMITTEE ON RULES OF PROCEDURE  
IN DOMESTIC RELATIONS CASES**

Friday, November 12, 2004 10:00 am – 3:00 pm

Arizona Courts Building

1501 W. Washington, Conference Room 230

Teleconference #: (602) 542-9006

Web Site: <http://www.supreme.state.az.us/drrc/>

**Members Present:**

Hon. Mark Armstrong

Annette Burns, Esq.

Hon. Norm Davis

Annette Everlove, Esq.

Elaine Fridlund-Horne, Esq.

Bridget Humphrey, Esq.

Phil Knox, Esq.

Robert Schwartz, Esq.

Debra Tanner, Esq.

**Members Not Present:**

Hon. Michael Jeanes

Janet Metcalf, Esq.

Hon. John Nelson

Hon. Dale Nielson

Richard Scholz, Esq.

Dr. Brian Yee

**Staff Present:**

Konnie Neal

Karen Kretschman

Elizabeth Portillo

**Quorum:**

Yes

**1. Call to Order: Hon. Mark Armstrong**

After welcoming Committee members, Judge Armstrong reviewed the new materials contained in the meeting packet:

- Agenda
- Membership List
- October minutes
- Memo from Judge George Foster regarding Service Rules
- Memo and materials from Jim McDougall regarding ADR Rules

**2. Feedback from Committee Presentations**

Judge Armstrong stated that since our last meeting, the following presentations have been made by members of this Committee:

- Judge Armstrong and Konnie presented at the Presiding Judges' Committee and the Arizona Judicial Council (AJC);
- Konnie presented at the Committee on Superior Court, and
- Judge Armstrong and Konnie also presented at the Conciliation Roundtable.

The reaction at the Presiding Judges' Committee and AJC was that the Committee should seek as much input as possible as early as possible because they want to have it settled and comments resolved before seeking public comment. Judge Armstrong said the Committee should strive to do this.

Judge Armstrong stated that he wanted to present to the State Bar Convention in June, 2005. However, this is so close to the Supreme Court's Rules Agenda, that input will be needed from the Bar before that time. Other presentations will be at the AFCC; the Pima County Bar (a written request); Executive Council of the State Bar; the Domestic Relations Judicial Conference, and for other interested groups as the need arises.

Judge Armstrong said it is important to encourage comments and that people who wish to comment may e-mail Konnie. He also said that it would be worthwhile for the attorneys on the Committee to speak with other attorneys. The Committee will send letters to the County Bars in Pima and Maricopa. It was suggested to have all the information on a web site, and Judge Armstrong said this was a good idea; however, the Committee still needed to talk to people and give them the specifics, or give them a hard copy of the specifics. The suggestion was made for Konnie to write an article for the *Arizona Attorney*. Konnie suggested posting a truncated version of the Committee membership list on the web site, and the members were amenable to that suggestion.

**3. Out of State Service - Judge Norm Davis**

Judge Davis received a document entitled, "Proposal for Amendment of *A.R.C.P.* 42(c), Service by Mail; Return, from Judge George Foster in Maricopa County. Judge Foster is the Chairperson of the Family Court Rules Committee in Maricopa County.

Judge Davis said it was a minor change. After discussion, Judge Armstrong assigned this amendment to the appropriate workgroup, and Judge Warner will report on this proposal for the next meeting.

**TASK: Judge Warner will report on the proposal at the December meeting.**

**4. Rule 10 - Court Interviews of Children**

Judge Armstrong stated that he and Konnie made the changes that are now in the *ARFLP* regarding this rule, and they are the same as the changes which Dr. Yee prepared. Judge Davis suggested looking at A.R.S. § 25-1010(e). He stated that this statute tracks what the UCCJEA conference would require – any electronic medium in its conceivable form.

Bob Schwartz asked if the definition of what the court can do regarding “to ascertain the child’s wishes as to the child’s custodian and as to parenting time” is too narrow. Judge Davis said that this is the authority that the statute gives for interviewing children and is taken exactly from the statute (A.R.S. § 25-405). Judge Armstrong stated that this is a very broad statement and he was not concerned about this, as no judges have been challenged on this. Therefore, he sees no reason to broaden it based on this history.

Judge Davis stated his concern regarding the parties not having this information, whether it is part of the custody decision or, conversely, whether it had no impact on the decision. He believes the parties have a right to this information. He said that if the parties cannot have it, then perhaps the court should not be interviewing the child. Judge Davis cited the Court of Appeals decision which said that if a judicial officer gets any information from any source, the parties have a right to know about it. Judge Armstrong answered that this is inherent in due process, and did not believe that it was necessary to add this additional information to this rule. He said there can be some reasons why the information should be withheld (i.e., it could present a danger to the child), and would rather leave it silent. Judge Warner agreed with Judge Armstrong.

Judge Armstrong said that perhaps there should be a statement in the Comment about the meaning of “sealing.” Discussion ensued. Judge Armstrong will review the statutes to find any rule on “sealing,” and will work on the Comment for the December meeting.

**TASK: Judge Armstrong and Konnie will review the statutes, seek input from Michael Jeanes, and work on the comment regarding “sealing” for the December meeting.**

**5. Memo from James McDougal – Judge Nanette Warner**

Judge Warner presented background information on James McDougal’s letter which asks for reconsideration of some provisions in the Alternative Dispute Resolution (ADR) Section. The area of controversy which continues to exist is the issue of attorneys’ fees, ADR Rule 9(b). The materials which James McDougal provided concern mediation confidentiality.

In his letter, James McDougall states that he would like a settlement conference judge to have the same confidentiality responsibilities the mediator. He stated that a settlement conference judge should not ever have to disclose anything that took place including that someone did not come to the court-ordered settlement conference and negotiate in good faith or take an unreasonable position. .

Judge Armstrong asked the Committee to look at ADR Rule 2(a) where it states that a settlement conference judge and mediator are equated. ADR Rule 9(b) was added to Rule 2(a). James McDougall states that ADR Rule 2(a) is inconsistent with ADR Rule 9(b). Judge Armstrong raised the question of whether the settlement conferences with mediation are equal. One major difference is that settlement conferences are presided over by judges and judges pro tem. Discussion ensued.

Judge Davis made a comment that this can discourage or deter people to serve as settlement conference judges pro tem. He stated that when you have an emotionally driven system where cases do not settle for every reason, except that it is a reasonable legal good faith position, you could have a disaster if you do not have some sanction for people who are clogging the system or clogging the ADR processes for emotional reasons.

Judge Armstrong stated that he opposes equating settlement conferences in mediation. He agreed that ADR Rule 2(a) is too broadly written as it currently exists. Judge Warner offered to rewrite it and send it to Konnie and scan through the rule for consistency.

**TASK: Judge Warner will rewrite ADR Rule 2(a) and will follow up with James McDougall.**

**6. Approval of Minutes**

At this time, a quorum was present for the approval of minutes.

<b>Motion:</b>	<b>Minutes approved.</b>
	<b>Seconded.</b>
<b>Vote:</b>	<b>Minutes approved.</b>

**7. Modification Report – Annette Everlove**

Judge Armstrong asked Annette Everlove to speak on this report. Based on the discussion, Annette Everlove made a suggestion. Deb Tanner had been grappling with using the terms “Spousal Financial Affidavit” and “Child Support Financial Affidavit.” She pointed out that there are situations that are common where the spousal financial affidavit would have to be filed even though there has never been a marriage. She suggested removing the word “spousal” and replacing it with a different term, something that would be less disconcerting to those who had not been married. It was suggested to use the term “comprehensive” rather than “spousal.”

The other issue was to adapt the disclosure requirements found for initial proceedings to post decree proceedings. This was addressed in paragraph J but is informal. At the moment we do not have disclosure requirements on post decree petitions or motions. This is not so burdensome that it has any kind of time constraints other than the three judicial days. It provides people with warning but does not give them a right to gather a mountain of information.

If this cursory disclosure indicates that the proceedings could not be heard in the time indicated or that there needs to be additional discovery, it would then give the responding party an opportunity to ask for a motion to continue. There was discussion regarding paragraph (k) where it reads: “at least three judicial days prior,” and to possibly change this to: “as reasonably soon thereafter is obtained.” Also “not later than” would be appropriate but also add a clause that would say: “or as otherwise ordered by the court.” There was a question on whether a good cause exception (Rule 26.1) should be added; one member suggested revising the language to “no later than three judicial days prior” and adding a good cause exception and also a provision that allows the court to order a different timeframe.

The Petition to Modify Child Custody, Subsection (e), needs finalizing. Annette Everlove needs help in working through paragraphs 4 and 5. Annette stated that the practice in Pima County is that modifications of child custody must go to the presiding domestic relations judge who then determines whether it will be assigned to a division for hearing. In paragraphs 4 and 5 it states that it goes to a judge or a judge’s designee. Perhaps this can be changed to be less specific. Judge Armstrong commented that there is nothing in the statute that requires that it be reviewed. Judge Armstrong stated that the terminology needs to be consistent.

**TASK: Annette Everlove will delete this requirement and use the language from the Maricopa County Rule 6. In paragraphs 4 and 5 the word “presiding” will be changed to “assigned.”**

Elaine Fridlund-Horne suggested that for uniformity in some of the smaller counties where hearings can be set very quickly, it is made more clear that the affidavit process should be completed no sooner than five days after the expiration of the time permitted for filing a Response. It is not clear as to whether this should be under either H or G. Annette asked the Committee where the Contempt Section should be included. There was discussion at the last meeting about adding in a provision in the Post Decree Section regarding contempt matters. Bridget Humphrey suggested moving (d) (Failure to Comply Section) down to the bottom so that all of the various petitions that are addressed would be sequential, and then adding a contempt provision. Judge Armstrong stated that perhaps Rule 52(b) and 52(l), dealing with Temporary Orders on Post Decree and the Accelerated Temporary Orders, could be cross-referenced.

Judge Armstrong asked how parties get a hearing in this modification. Annette Everlove stated that in Pima County, they use a Notice of Hearing and an Order to Show Cause. She changed the verbiage to read, “Notice of Hearing/Order to Appear,” which will be an approved form. Bridget concurred on this. Annette stated that in paragraph (g), it reads, “The Notice of Hearing/Order to Appear will be submitted with each Motion Petition or Request for Order to Appear.”

It was suggested that under “Identity of Opposing Counsel” it should read, “if known,” because if it is post-decree, the lawyers would have automatically withdrawn, and unless there have been discussions, the parties may not know the name of the opposing counsel.

Annette Everlove cautioned about the perception that people in Maricopa County might have—that they are entitled to a hearing anytime they file something. She looked at Rule 6, which also indicates there will be a hearing. Judge Armstrong stated that Maricopa County is closer to the Coconino County model, in terms of unstated findings, or they are determined after the Return Hearing. He said that 99% of the time parties arrive with an Order to Show Cause, and they get a hearing date immediately. The 4.11 finding is either made at that time, unstated, or is made at the Return Hearing. He stated that the new verbiage would change the practice in Maricopa County, but not necessarily in a bad way.

Judge Warner suggested that children are frequently traumatized by constantly returning to court, and this process inhibits frivolous motions to change custody.

Robert Schwartz asked to discuss Subsection (h). He said he finds it a little confusing. It reads, “Matters brought before the court by motion or any other application for relief not designated herein shall be heard by oral argument without testimony.” He stated that for the court to make findings on issues, there would need to be testimony. Annette said this statement relates to the fact that sometimes there are non-evidentiary hearings and attorneys will show up with their clients who want to tell the judge this or that. It may not have been set down as an Evidentiary Hearing. This statement would cover Motions for Summary Judgment or Expedited Hearings. Annette asked him to send her his thoughts on this and she would work on new wording.

**TASK: Robert will send his thoughts regarding oral argument without testimony to Annette Everlove, who will then work on new wording.**

Judge Armstrong said this will be a controversial issue because it does change the practice for most people in Arizona, but perhaps for the better. The Committee needs to strive for a uniform process statewide.

**TASK: Annette will rework this Section and e-mail copies to the members for their comments before the December meeting.**

**8. Break for Lunch (Some of the workgroups met over the lunch hour.)**

**9. Reports from Workgroups**

Judge Armstrong stated that since so much of the Workgroups’ issues had already been covered, the Committee would only hear from those Workgroups who had not yet given a report.

**Workgroup 5: Disclosure and Discovery (Judge Nelson, Chair)**

Judge Armstrong stated that Judge Nelson was not present, but he had spoken to Bob Schwartz before he left the meeting, and asked him to take one more look at the draft. Bob said he thought it was pretty complete and was comfortable having the two tracks the Committee had introduced.

**Workgroup 7: Pretrial and Trial Procedures (Judge Nielson, Chair)**

Judge Armstrong stated that Judge Nielson had been campaigning and had been re-elected to the bench, and would return to the Committee meetings in December.

Annette Burns stated in IX; Pretrial and Trial Procedures, that no changes were made in the first part: “Resolution Management Conference.” There was a change in “Family Court Motion Practice” with a comment at the end of that new rule points out that it is derived from existing Rule 7.1 ARCP. This is the first time that this Family Court Motion Practice Rule has been in this draft. Judge Armstrong asked what the major differences were between this and the Civil Rule. It was stated that this was mainly wording changes. The existing Civil Rule was lengthy regarding motions and responses. Basically the wording was changed to make it clearer. There was no substance of changes from the existing.

The Pretrial Statement had not been changed in any way. Other items that were not there before but have been finished by the workgroup are: Trial Continuances, Motion to Continue, and Scheduling Conflicts Between Courts. These are from the existing ARCP Rule 16(h). There are no changes, and this covers inter-division conflicts. Subsection (e) is from our existing ARCP, and no changes were made. The need to have this put in was discussed at the last meeting. At the previous meeting, regarding Involuntary Dismissal, it was discussed putting in the 4 months dismissal after 60 days notice. It was suggested that perhaps we could delete “on motion for good cause shown.” Discussion ensued. A question was raised as to the Interpreters Section. This is an existing rule, this portion was not rewritten, and the question is whether we need these. Discussion ensued on compensation for these services. The next course of action for this workgroup is to go through some of these portions and determine whether they are necessary and not excessive. Under Rule 44(m) there is still a reference to “jury” that needs to be taken out. Annette Burns stated that a fair amount of clean up will be needed in this section. Judge Armstrong stated that every workgroup needs to look at their section and read them from beginning to end to check for coherence. Annette Burns asked that she be notified if there are any substantial changes.

A questions was raised if there was any reason why the Motion Practice Portion could not be included in the Pleadings and Motions Section and applied to all proceedings not just Pretrial. It was suggested that by going through the sections and making sure everything is coherent it could help with this question.

#### **Workgroup 8: Judgments (Phil Knox, Chair)**

Judge Armstrong and Konnie have gone through the latest version of this section. Judge Armstrong asked Phil Knox if he would go through both versions with the workgroup and see if they could be reconciled, rather than having discussion at this time. The workgroups latest efforts were distributed.

**TASK: Phil and the Judgments Workgroup will reconcile the revised versions, and Phil will send a revised draft to Konnie.**

#### **Workgroup 9: Post-Judgment Proceedings (Judge Davis, Chair)**

Judge Armstrong asked Judge Davis if there was anything new on Post Judgment. Judge Armstrong was stated that the group was going to be meeting in a few minutes, so Annette could bring Judge Davis up to date on what the committee did during the meeting while Judge Davis was gone.

**Workgroup 10: Sanctions and Contempt (Judge Nelson, Chair)**

Judge Armstrong stated that he did not think there was anything new since the last meeting.

**Workgroup 11: Family Court Forms (Bridget Humphrey, Chair)**

Judge Armstrong asked if there was any input from this workgroup. Bridget stated that very few revisions had been made. Bridget spoke to Karen Kretschman, and it appears that arrangements have been made to post “fillable” DR forms on the Supreme Court website.

**TASK: Bridget will arrange meetings with workgroup to work on forms in addition to the Post Decree Proceedings form**

**10. Call to the Public – Judge Armstrong**

Judge Armstrong stated that there were no members of the public in attendance for comments.

**11. Next Meeting – Konnie Neal**

The next Committee meeting will be held on **December 10, 2004**, at the Arizona Courts Building, 1501 W. Washington, Conference Room 345, Phoenix, Arizona from 10:00 am to 3:00 pm. The conference call number is: 602.542.9006.

**12. Adjournment**

The meeting adjourned at 2:00 pm.